A **MALAYSIAN NEWSPRINT INDUSTRIES SDN BHD**

**v.**

**BECHTEL INTERNATIONAL INC & ANOR**

B HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID JC
[CIVIL SUIT NO: S6-22-1126-2002]
26 AUGUST 2013

C ***CIVIL PROCEDURE:*** *Documents - Expungement - Application to exclude and expunge documents - Documents pertaining to communication between solicitor and client - Whether express consent given to disclose solicitor and client communications - Whether solicitor and client privilege attached to solicitor and client communications remained intact - Whether*
D *documents qualify as public documents - Evidence Act 1950, s. 74 - Documents marked or made without prejudice and covered by privilege - Whether should be expunged and excluded from being admitted in court*

***LEGAL PROFESSION:*** *Privilege - Communication between solicitor*
E *and client - Whether absolute - Whether express consent given to disclose solicitor and client communications - Whether solicitor and client privilege had been waived - Whether solicitor and client privilege attached to solicitor and client communications remained intact*

This was the plaintiff's application ('encl. 64') to exclude and
F expunge documents which were privileged from disclosure and/or use in this present action ('application'). On 6 March 2013, the defendant served on the plaintiff the defendant's bundle of documents ('DBOD'). According to the plaintiff, included within the DBOD, were communications between the plaintiff and its
G solicitors ('Solicitor-Client Communications') that would be extremely prejudicial to the plaintiff if disclosed. The defendant, however, objected to the plaintiff's application and submitted that the plaintiff did not file any application to exclude/expunge and/or prohibit the use of the documents ('documents in question') in
H DBOD at any stage of the proceedings, hence these documents were now public documents pursuant to s. 74 of the Evidence Act 1950. The defendants further contended that the plaintiff had voluntarily furnished the documents in question to one Mark Helwig, an employee of the first defendant, and that any privilege
I attached to the documents in question had been expressly waived

by the plaintiff in allowing and in instances forwarding the documents in question to Mark Helwig. Furthermore, the seconding agreement under which Mark Helwig was operating with the plaintiff, contained no restriction as to the use or disclosure of materials relating to the project that came to his possession. The defendants submitted that the documents in question were relevant to the issues arising in this suit and that there would be a serious miscarriage of justice to the defendants in the event the defendants were not allowed to refer to the documents in question at the trial of this action. The plaintiff, on the other hand, submitted that solicitor-client communications were absolutely privileged in law. It was not disputed that by way of the seconding agreement, Mark Helwig was seconded by Bechtel Malaysia Inc ('BMI') to the plaintiff as a project controls manager. During that time, Mark Helwig was given access to the plaintiff's documents including the solicitor-client communications. In some of the documents in question, the plaintiff had incorporated express warnings that such privilege information was only intended for the plaintiff and any distribution of the material to any other persons was strictly forbidden. Mark Helwig was also told that these documents in question were sensitive and confidential thus he did not have the right to pass these documents to the defendants. The plaintiffs submitted that this alone should be enough to decide on the application. The issues that arose were, *inter alia*, whether solicitor-client privilege had been waived; whether express consent was given to disclose the solicitor-client communications and whether the documents in question qualified as public documents.

**Held (allowing plaintiff's application):**

**(1)** The solicitor-client privilege is absolute and permits of only one exception which is waiver: (a) upon the express consent of the client given and directed to the advocate; and (b) such consent must be intentional and deliberate. In view of the Federal Court decision *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor*, the requirement that there must be an intentional and deliberate act to waive the legal privilege by the privilege holder must be held as the applicable law. (paras 54-56)

**(2)** Consent was given to the plaintiff's solicitors to have a dialogue, which was "a discussion directed towards exploration of a subject or resolution of a problem" with Mark Helwig on several issues. This could not amount to the plaintiff giving its express consent to the solicitor to disclose the solicitor-client communications. Mark Helwig was seconded to act as the plaintiff's project controls manager who was to act under the supervision of the plaintiff. In that capacity, any discussions and communications with Mark Helwig, at best, formed part of the privileged and internal discussions of the plaintiff. (para 56)

**(3)** Mark Helwig was seconded by BMI and not the defendants. Even if this amounted to consent (which was not the case), at the most, consent was given to disclose to BMI. No consent was given to either Mark Helwig or BMI to disclose to the defendants. This was especially so since the opinion dealt with the plaintiff's case against the defendants. Furthermore, the fact that the solicitor-client communications came into the hands of the defendant through Mark Helwig did not mean that the privilege was lost or that the defendants were entitled to use it against the plaintiff. The defendants had obtained the documents in question wrongfully through Mark Helwig who had no right to pass them on to the defendants. (paras 56 & 58)

**(4)** The law is very clear that this privilege is absolute and permits of only one exception which is upon the express consent of the client given and directed to the advocate and which consent must be intentional and deliberate. The common law maxim "once privileged, always privileged" as embodied in ss. 126 to 129 of the Evidence Act 1950 must be recognised. The common law rule of waiver by implication or imputation is not recognised and clearly, the defendants failed to prove these elements as no express consent was given and in any event the disclosure to Mark Helwig could not be said to be intentional or deliberate. Hence, the solicitor client privilege attached to the solicitor client communications remained intact. (para 67)

**(5)** The documents in question did not qualify as public documents pursuant to s. 74 of the Evidence Act 1950. It provides for two classes of public documents. The first class includes the acts or records of the acts of certain authorities

and officers. The second class relates to public records of private documents. It is clear from s. 74 that the documents must itself form the act or record of the acts of public officer. (para 78)

**(6)** A document could not be referred and admitted as evidence if it is privileged even if it is in the hands of the opposite party. If it is privileged, a document in the hands of an opposite party may be recovered back. All documents marked or made without prejudice as well as documents covered by professional solicitor-client privilege should be expunged and excluded from being admitted at trial or in court in the present action. (para 82)

**Case(s) referred to:**

*Amakannu Veerapan & Ors v. Mayland Development Sdn Bhd [2011] 5 CLJ 171 HC* ***(refd)***

*Anderson v. Bank [1876] LR 2 Ch D 644* ***(refd)***

*Azhar Ab Wahab v. Acv-Icm Quarry Sdn Bhd [2013] 1 LNS 37 HC* ***(refd)***

*Boss Ramasamy v. Penang Port Sdn Bhd & Anor [1996] 1 LNS 26 HC* ***(refd)***

*Dato' Anthony See Teow Guan v. See Teow Chuan & Anor [2009] 3 CLJ 405 FC* ***(dist)***

*Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1988] 1 LNS 188 HC* ***(refd)***

*Dato' Yap Peng v. PP [1993] 2 CLJ 181 HC* ***(refd)***

*Dr Munawar Ahmad Aness v. Ketua Pengarah Penjara Malaysia & Ors [1999] 6 CLJ 332 HC* ***(refd)***

*Extreme System Sdn Bhd v. Ho Hup Construction Company Bhd & Ors [2010] 1 LNS 338 HC* ***(refd)***

*Gopinathan Subramaniam v. Timbalan Menteri Dalam Negeri & Ors [1999] 7 CLJ 558 HC* ***(refd)***

*Great Atlantic Insurance Co v. Home Insurance Co and others [1981] 2 All ER 485* ***(refd)***

*Heyne v. Fischel & Co (1913) 30 TR 190* ***(refd)***

*IJM Corporation Bhd v. Harta Kumpulan Sdn Bhd (No 2) [2008] 8 CLJ 308 HC* ***(refd)***

*International Business Machines Corp and another v. Phoenix International (Computers) Ltd [1995] 1 All ER* ***(refd)***

*Malayan Banking Bhd v. Foo See Moi [1981] 1 LNS 95 FC* ***(refd)***

*Minter (Pauper) v. Priest [1930] AC 558* ***(refd)***

*Mohamed Ismail v. Tan Sri Haji Osman Saat & Ors [1982] 2 CLJ 533; [1982] CLJ (Rep) 581 HC* ***(refd)***

*Murchison v. Export Development Canada (2009) FC 77* ***(refd)***

*Norakhmar Baharom & Anor v. Lee Ming Leong & Ors [2007] 1 LNS 338 HC* ***(refd)***

A *Sturla v. Freccia (1880) 5 AC 623* ***(refd)***
*Tentat Singapore Pte Ltd v. Multiple Granite Pte Ltd & Others [2008] SGHC 136* ***(refd)***
*Yeoh Kee Aun v. PI Capital Asset Management Sdn Bhd & Anor [2000] 1 LNS 132 HC* ***(refd)***

B **Legislation referred to:**
Evidence Act 1950, ss. 23, 74, 126-129
Rules of Court 2012, O. 41 rr. 5(2), 12
Rules of the High Court 1980, O. 24, O. 41 r. 5(1)

C **Other source(s) referred to:**
*Sarkar on Evidence*, 14th edn, p 1078

*For the plaintiff - WM Chang; M/s Raja, Darryl & Loh*
*For the defendants - Rodney Gomez; M/s Shearn Delamore & Co*

D *Reported by Suhainah Wahiduddin*

## JUDGMENT

E **Kamaludin Md Said JC:**

**[1]** This is the plaintiff's application in encl. 64 to exclude and expunge documents which are privileged from disclosure and/or use in this present action ("application").

F **[2]** The defendants objected to the plaintiff's application.

**[3]** The relevant cause papers filed in respect of the plaintiff's application and the defendants' objection herein are as follows:

G (a) The plaintiff's notice of application dated 9 April 2013 ("notice of application");

(b) The affidavit in support of Nathan Kandapper which was affirmed on 5 April 2013 ("the plaintiff's first affidavit");

H (c) The affidavit in reply of Yau Yat Loong which was affirmed on 7 May 2013 ("the defendants' first affidavit"); and

(d) The affidavit in reply No. 1 of Nathan Kandapper which was affirmed on 22 May 2013 ("the plaintiff's second affidavit").

I (e) The affidavit in reply of Yau Yat Loong which was affirmed on 4 June 2013 ("the defendants' second affidavit")

**Attached Documents (Under Prayer (1))**

**[4]** At the outset, the issue was raised that the plaintiff is also seeking to exclude and/or prohibit the documents attached to the privilege documents (hereinafter referred to as "attached documents") without establishing whether the same is privileged or not.

**[5]** I agree with the defendants' solicitor that there is no legal basis to do so. This would essentially mean that the documents that are otherwise subject to disclosure are automatically prohibited merely because they were attached, referred and/or enclosed with properly exempted documents. For example whenever a client submits documents to a solicitor for advice and to which the solicitor does so by referring or attaching the said documents, the extension of the plaintiff's argument would mean that such documents forwarded by the client to the solicitor become privileged. It is pertinent to cite a passage in a Canadian case namely *Murchison v. Export Development Canada* (2009) FC 77 that dealt with a situation similar to this where the court held at pp. 29-30 paras. 44-46, "no automatic privilege attaches to documents which are not otherwise privileged simply because they come into the hands of a party's lawyer".

**[6]** The plaintiffs' solicitor was not aware if there could be other documents emerged later which are privilege documents. However he conceded, the documents and communications passing between the plaintiff and its solicitors which are subject to solicitor-client privilege, including the documents listed in appendix A of the plaintiff's first affidavit in exh. "P2" should be dealt with by this court.

**[7]** In the circumstances it was agreed that the words "attached documents" as appearing at prayer 1 of plaintiffs' application is unnecessary and the argument will proceed to 12 solicitor-client communications which the court will determine whether to exclude and expunge from disclosure and/or use in this present action.

**Privileged Documents**

**[8]** There are two types of documents which the plaintiff seeks to expunge and exclude in this application:

(a) Documents and communications passing between the plaintiff and its solicitors which are subject to solicitor-client privilege, including the documents listed in appendix A of the plaintiff's first affidavit (exh. "P2"); and

(b) Documents marked and made "without prejudice" namely the letter from M/s Owen Bird to M/s Shook Lin & Bok dated 7 September 1998.

**Documents Subject To Solicitor-Client Privilege**

**[9]** On 6 March 2013 the defendant had served on the plaintiff the defendant's bundle of documents volumes A to G ("DBOD"). Included within the DBOD were communications between the plaintiff and its solicitors as well as a queen's counsel ("solicitor-client communications") who were engaged in respect of this case.

**[10]** Despite this being pointed out to the defendants, they insist on using these documents at trial. The defendants have exhibited these documents ie, exhs. "YYL-1" at pp. 17-21 and 39-40 and "YYL-4" to the defendants' first affidavit.

**[11]** These 12 solicitor-client communications includes advice given by the plaintiff's solicitors to the plaintiff with regard to this very case and would be extremely prejudicial to the plaintiff if disclosed. It is for this reason that the plaintiff urged this court should not even read them even though they have been exhibited.

**Defendant's Objection**

**[12]** I shall, deal with the defendant's objection first.

**[13]** The plaintiff's application relates to 13 documents.

**[14]** The defendants broke up these documents into four different categories in order to address the legal principles relating to them.

*First Category Of Documents: Three Letters (Under Prayer (1))*

**[15]** In the first category, the three letters listed in appendix A of the plaintiff's application which the plaintiff is seeking to exclude, namely:

(a) letter dated 4 February 1999 from M/s Raja Darryl & Loh to the plaintiff;

(b) letter dated 28 January 1999 from M/s Owen Bird to the plaintiff;

(c) letter dated 28 January 1999 from the plaintiff to M/s Raja Darryl & Loh;

Collectively it shall all be referred to as the "three said letters".

**[16]** The three said letters could be found in exh. YYL1 of the defendant's affidavit in reply No. 1 at pp. 17-19, 20-21 and 39-40. It is not disputed that the three said letters were previously filed in court in respect of the stay application and the same were referred to by the parties during the submissions on the stay application in the High Court, Court of Appeal and the Federal Court.

**[17]** It is also not disputed that the plaintiff did not file any application to exclude/expunge and/or prohibit the use of the three said letters at any stage of the proceedings in respect of the stay application at the various levels of court.

**[18]** Hence, these documents are now public documents pursuant to s. 74 of the Evidence Act 1950.

**[19]** The defendant further submit that the three said letters have already been placed before the court during the stay application and was read together with the other exhibits during the stay application. Thus, whatever privilege if there was in the first place, has been waived and can no longer be retrieved. See *IJM Corporation Bhd v. Harta Kumpulan Sdn Bhd (No 2)* [2008] 8 CLJ 308 at p. 329, *Extreme System Sdn Bhd v. Ho Hup Construction Company Bhd & Ors* [2010] 1 LNS 338; [2010] MLJU 1608 and *Tentat Singapore Pte Ltd v. Multiple Granite Pte Ltd & Others* [2008] SGHC 136 at p. 43.

**[20]** In addition to the above, the defendant pointed out that in this case Mark Helwig who obtained the three said letters then, has clearly explained how the same came to the defendants' possession as can be seen by the two affidavits sworn by him for the purpose of the stay application, namely:

(i) Mark Helwig's affidavit affirmed on 8 November 2004 (exh. YYL1 at pp. 33-40 of the defendant's affidavit in reply No. 1), in particular paras. 7 to 12; and

(ii) Mark Helwig's affidavit affirmed on 9 December 2004 (exh. YYL2 at pp. 49-55 of the defendant's affidavit in reply No. 1), in particular paras. 9 and 10.

**[21]** It is the defendants' submission that as the plaintiff did not file the application to exclude/expunge and/or prohibit the use of the three said letters at the relevant time ie, during the stay application, they cannot now object to the defendants using it in the same action.

**[22]** The plaintiff has suggested *via* plaintiff's affidavit in reply No. 1 that the contents of the aforesaid two affidavits of Mark Helwig were disputed by affidavit evidence. Defendants do not agree because they believe, this does not alter the fact that the three said letters can still be referred to in court. The only way a party can avoid or stop an opponent from referring such documents in court (during the stay application) would be by way of an application to expunge such documents from the court record, which they add, the plaintiff failed to do so then. This has been held in numerous cases such as:

(a) *Yeoh Kee Aun v. PI Capital Asset Management Sdn Bhd & Anor* [2000] 1 LNS 132; [2000] 4 MLJ 508 at pp. 508-509;

(b) *Norakhmar Baharom & Anor v. Lee Ming Leong & Ors* [2007] 1 LNS 338; [2007] 8 MLJ 50 at p. 50;

(c) *Mohamed Ismail v. Tan Sri Haji Osman Saat & Ors* [1982] 2 CLJ 533; [1982] CLJ (Rep) 581; [1982] 2 MLJ 133 at p. 133.

**[23]** In Mark Helwig's first affidavit affirmed on 8 November 2004 (exh. YYL1 at pp. 33-40 of the defendant's affidavit in reply No. 1), in particular paras. 7 to 12, he has basically stated that:

(i) Mr Graham Ogilvie of the plaintiff had asked him to research various issues at the site and to participate in a series of conferences with both Canadian and Malaysian counsel in order to facilitate the plaintiff's efforts to evaluate its various claim options against various service providers.

(ii) In regards to the plaintiff's letter dated 28 January 1999 to M/s Raja, Darryl & Loh, Mr Ogilvie expressly directed Mr Chang Wei Mun of M/s Raja, Darryl & Loh to have "dialogue with myself (Mr Ogilvie) or any of the other people copied with this letter on any aspect of the issues". Mark Helwig was one of those individuals copied on the said letter and he participated in a series of discussions with, *inter alia*, Mr Chang Wei Mun on those issues.

(iii) The plaintiff and its legal team were aware that Mark Helwig was an employee of the first defendant at all times. A

(iv) Although at the onset it was discussed that the case could end up in court and the sensitivity/confidentiality of the discussions was pointed out to all, Mark Helwig was purposefully copied on the plaintiff's letter dated 28 January 1999 to M/s Raja, Darryl & Loh and was expressly invited to the meeting with Mr Chang Wei Mun and Canadian counsel by Mr Ogilvie. B

(v) In regards to M/s Raja Darryl & Loh's letter dated 4 February 1999 and M/s Owen Bird's letter dated 28 January 1999 both to the plaintiff, Mark Helwig confirmed that during the course of his work in the project for the plaintiff, these letters were furnished to him personally by Mr Graham Ogilvie of the plaintiff. C D

**[24]** In Mark Helwig's affidavit second affirmed on 9 December 2004 (exh. YYL2 at pp. 49-55 of the defendant's affidavit in reply No. 1), in particular paras. 8 to 10, he has basically stated that: E

(i) He was operating with the plaintiff under the terms of a seconding agreement, which is enclosed in exh. YYL3 of the defendant's affidavit in reply No. 1.

(ii) The aforesaid letters between the plaintiff and its Canadian and Malaysian solicitors were given to him freely during the course of his work. F

(iii) The seconding agreement contains no restriction on his use of those materials given to him and he was not asked at any time to sign any sort of confidentiality agreement. G

(iv) He was expressly introduced at a roundtable meeting to Mr Chang Wei Mun of M/s Raja, Darryl & Loh as an employee of the first defendant who had been seconded to the plaintiff. This introduction took place prior to any disclosures by the plaintiff or its solicitors concerning the legal issues involved. He was also introduced to Mr Barry Kirkham of M/s Owen Bird as an employee of the first defendant. Hence, his status and identity of his employer was disclosed to both Canadian and Malaysian counsels prior to the disclosure of any alleged privileged matters. H I

**[25]** In essence, therefore, the plaintiff voluntarily furnished the three said letters to Mark Helwig who was known to be an employee of the first defendant. The defendants submits that even should there have been any privilege attached to the three said letters (which is not admitted), the same has been expressly waived by the plaintiff (the privilege holder) in allowing and in instances forwarding the documents to Mark Helwig, an employee of the first defendant. In fact, if one reviews the three said letters itself, it is clear that the three said letters are addressed or copied to him.

**[26]** Furthermore, the seconding agreement, under which Mark Helwig was operating with the plaintiff, contains no restriction as to the use or disclosure of materials relating to the project that come to his possession.

**[27]** Here, the defendants referred to the leading case on waiver of privilege namely the case of *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14 at p. 27 para. 25. In that case the Federal Court affirmed the principle that the privilege on a document will remain so until waived by the privilege holder. This principle can also be seen in the leading English case of *Minter (Pauper) v. Priest* [1930] AC 558 at pp. 579-580.

**[28]** The defendant also refer to the authoritative text on the law of privilege by Suzanne B McNicol at p. 33, where the learned author has described the consequences of waiver:

> A communication does not cease to be in the category of privileged communications by reason of waiver... waiver of a privileged communication merely made the communication "available in evidence" but it did not take the communication out of the category of privileged communications.

**[29]** It was impressed upon the court that a subsidiary point that arises from the exchange of affidavits is the averment found in para. 7 of the plaintiff's affidavit in reply No. 1 in that Mr Graham Ogilvie has purportedly informed the deponent of the plaintiff's affidavit in reply No. 1 that he disagrees with the matters raised in Mark Helwig's affidavit. In this respect, the defendants submit that this is a bare averment and should be rejected outright. Further, the defendants contended that the said Graham Ogilvie

who did affirm numerous affidavits in the stay application had not affirmed any affidavit then to rebut the matters raised by Mark Helwig in both his affidavits. In fact as at today, the said Graham Ogilvie has not affirmed any such affidavit. In the totality of the situation the defendants submit that this bare averment must be rejected by This Honourable Court.

**[30]** The defendants submitted that the three said letters are relevant to the issues arising in this suit. A review of the three said letters will reveal that there is no culpability on the part of the defendants on the matters now raised in the statement of claim and that the plaintiff were aware that the limitation of liability clause (that is incorporated in the technical service agreement ("TSA")) was meant to apply to the extended project services. It is therefore submitted that the three said letters are relevant as it will assist the defendants in establishing the matters pleaded at paras. 44 to 46 of the defence.

**[31]** The defendants further submits that there will be a serious miscarriage of justice to the defendants and the defendants will be severally prejudiced in the event the defendants are not allowed to refer to the three said letters at the trial of this action.

*Second Category Of Documents: Nine Letters (Under Prayer (1))*

**[32]** In the second category, the defendants addressed the remaining nine letters listed in appendix A of the plaintiff's application which the plaintiff is seeking to exclude, namely:

(a) Contractors' invoices for micropiling and related works Schedule 3A (exhibited to plaintiff's letter dated 1 June 1988 to Barry Kirkham (of Owen Bird));

(b) Letter dated 20 April 1998 from M/s Owen Bird to the plaintiff regarding "insurance claim on non performance of piles";

(c) Letter dated 1 December 1998 from M/s Owen Bird to the plaintiff regarding "damage claim on non performance of piles";

(d) Facsimile dated 25 January 1999 from M/s Owen Bird to the plaintiff regarding "Malaysian Newsprint Industries";

(e) Facsimile dated 27 January 1999 from M/s Owen Bird to the plaintiff regarding "letter from Owen Bird to M/s Raja, Darryl & Loh";

A (f) Memo dated 16 January 1999 from the plaintiff to Barry Kirkham of M/s Owen Bird regarding "dry end spread footings";

(g) Facsimile dated 28 January 1999 from M/s Owen Bird to the
B plaintiff regarding "letter from Owen Bird to the respondent dated 28 January 1999";

(h) Letter dated 5 February 1999 from M/s Raja Darryl & Loh to the plaintiff "MNI Piling Issue – claims dated 4 February 1999";
C

(i) Facsimile dated 28 January 1999 from Graham Ogilvie (of the plaintiff) to Barry Kirkham (of M/s Owen Bird) regarding "MNI foundations claim";

D Collectively it shall all be referred to as the "nine said letters".

**[33]** The nine said letters can be found in exh. YYL4 of the defendant's affidavit in reply No. 1 at pp. 66 to 116. The defendants submit that the nine said letters came into the
E possession of Mark Helwig in a similar fashion as the three said letters. For example, if reference is made to exh. YYL4 at pp. 104, 111 and 116, it is clear that Mark Helwig was intentionally copied on these documents.

**[34]** In this respect, the defendants raised the argument of waiver
F and the principles derived from the authorities cited above. The defendants also submitted that the nine said letters are relevant as it will assist the defendants in establishing the matters pleaded at paras. 44 to 46 of the defence as well as the defendants' case that the problems alleged by the plaintiff are in fact attributed to
G third parties and/or the plaintiff themselves.

**[35]** The defendants further submitted that there will be a serious miscarriage of justice to the defendants and the defendants will be severally prejudiced in the event the defendants are not allowed
H to refer to the nine said letters at the trial of this action.

*Third Category Of Documents: Letter Dated 7 September 1998 (Under Prayer (2))*

**[36]** The defendants addressed the letter dated 7 September
I 1998 from M/s Owen Bird to M/s Shook Lin & Bok ("letter dated 7 September 1998"), which the plaintiff is seeking to exclude under prayer (2) of the plaintiff's application.

**[37]** The defendants submitted that the plaintiff is entitled to refer to the letter dated 7 September 1998 on the basis that the said letter was exhibited in Kuala Lumpur High Court Suit No: D4-24-243-1999 (exh. YYL6 of the defendant's affidavit in reply No. 1 at pp. 212-214). Based on the principles of the cases cited above, the letter dated 7 September 1998 is in the public domain and hence, whatever privilege there was (which is not admitted) has since been waived.

**[38]** Taking the above as a whole the defendants pray that the plaintiff's application be dismissed with costs.

**Plaintiff's Application**

**[39]** It is the plaintiff's solicitor submission that solicitor-client communications are Absolutely Privileged in law.

**[40]** Solicitor client privileged has been well established since 1876. In the case of *Anderson v. Bank*, [1876] LR 2 Ch D 644, 649 Jessel MR said:

> It is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim should have recourse to the assistance of professional lawyers, and it being so necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman with whom he consults with a view to the prosecution of his claim, or substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communication he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule.

See: *Anderson v. Bank*, 1876 LR 2 Ch D 644, 649 at plaintiff's bundle of authorities ("PBA") Tab 1.

**[41]** Apart from common law, this rule has found statutory recognition under ss. 126 to 129 of the Evidence Act 1950.

> Section 126 of the Evidence Act provides, *inter alia*, that:
>
> (1) No advocate shall at any time be permitted, **unless with his client's express consent**, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or

A condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment... (emphasis added)

See: Section excerpts of the Evidence Act 1950 at Tab 2 of PBA.

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**[42]** The leading case which dealt with this rule is the decision of the Federal Court in *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14 which endorsed the common law maxim regarding legal professional C privilege of "once privileged, always privileged" and that such privilege is absolute in nature. The court added that this rule permits of only one exception "ie, upon the express consent of the client given and directed to the advocate" that such consent must be intentional and deliberate and further that the common law rule D of waiver by implication or imputation is not recognised under Malaysian law. The Federal Court also stated that the following did not amount to a waiver of the privilege:

(a) The publication of the legal opinion by the executive director E of the appellant to various parties and in due course the respondents obtained a copy of the same;

(b) The legal opinion was exhibited to the respondent's affidavit in reply to the appellant's striking out application and was read in court;

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(c) The legal opinion was placed in Part 1 of Schedule 1 of the list of documents offered by the appellant in discovery.

See: *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* G [2009] 3 CLJ 405; [2009] 3 MLJ 14.

**[43]** In fact, the High Court in the case of *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] 1 LNS 188; [1989] 3 MLJ 445 (which was cited by the Federal Court), went so far to say that the privileged was not waived even:

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(a) where the document was included in the agreed bundle of documents; and

(b) where the defendants' solicitor had given the document to the I first plaintiff in the presence of all the defendants without objection from the defendants,

on the basis that waiver can only take place with the express consent of the defendants to their solicitors before the document could be disclosed.

See: *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1988] 1 LNS 188; [1989] 3 MLJ 445.

**[44]** This privilege extends to communications between foreign lawyers and their client:

> ... In the present case the correspondence between the American attorneys and the plaintiffs related to the Elger matter and to the reinsurance contract which had been entered into and which, as history relates, have led to litigation. Such correspondence **'ought certainly to be privileged'**.
>
> In the present case the relationship of solicitor and client between the American attorneys and the plaintiffs is undoubted. The plaintiffs were seeking and the American attorneys were proffering advice in connection with a business transaction. ... **This principle applies equally to communications between a client and his foreign lawyers or attorneys** (see *Macfarlan v. Rolt* (1872) LR 14 Eq 580)... (emphasis added)

See: *Great Atlantic Insurance Co v. Home Insurance Co and others* [1981] 2 All ER 485, CA [1981] 1 WLR 529 at PBA Tab 5; Followed in *International Business Machines Corp and another v. Phoenix International (Computers) Ltd* [1995] 1 All ER at PBA Tab 6.

*The Solicitor-Client Communications Was Wrongfully Passed On To The Defendants*

**[45]** The defendants contended that the solicitor-client communications and all other privileged documents were obtained by one Mark Helwig from the plaintiff who passed it on to the defendants and on that basis, the privilege has been waived.

**[46]** The following facts are not disputed:

(a) By way of a seconding agreement dated 22 April 1998, Mark Helwig was seconded by Bechtel Malaysia Inc ("BMI") to the plaintiff as a project controls manager. The seconding agreement provided that Mark Helwig would provide services under the exclusive supervision, direction and control of the plaintiff's senior project manager.

A See: Exhibit "YYL3" to the defendants' first affidavit for seconded agreement.

(b) During the time when Mark Helwig was so seconded, the plaintiff was seeking the advice of *inter alia* its legal advisers
B namely Mr Barry Kirkham QC of M/s Owen Bird and M/s Raja, Darryl & Loh on ways forward to resolve the matter and the potential claims available including claims against the defendants. Mark Helwig was asked to and did assist in respect of these claims.

C
(c) It was acknowledged by Mark Helwig himself that at the onset of his involvement with the plaintiff's legal counsels, at a "kick off meeting" it was "discussed that the case could end up in court and the sensitivity/confidentiality of the discussions was pointed out to all".
D

See: Exhibit "YYL1" to the defendant's first affidavit at p. 36, para. 8.

(d) During that time, Mark Helwig was given access to the plaintiff's
E documents including the solicitor-client communications. In fact some were copied to him.

(e) Copies of the solicitor-client communications and other documents were passed on to the defendant by Mark Helwig.

F **[47]** From the undisputed facts, it is clear that the solicitor-client communications were wrongfully passed on to the defendants:

(a) Mark Helwig was told that these documents were sensitive and confidential. In fact some of the privileged documents
G from the legal advisers of the plaintiff had incorporated express warnings that such privilege information was only intended for the plaintiff and any distribution of the material to any other persons are strictly forbidden.

H
(b) These documents were the property of the plaintiff and whatever may have been the case Mark Helwig did not have any right to take them with home with him when his secondment ended.

See: Plaintiff's second affidavit pp. 16 and 18 paras. 7.4 and 9.
I

(c) More so, Mark Helwig did not have the right to pass on sensitive and confidential information to the defendants. At that time the plaintiff was contemplating legal proceedings

against the defendants and it is somewhat baffling how Mark Helwig thought it appropriate to go behind the plaintiff's back to disseminate this information to the defendants.

**[48]** The plaintiffs submitted that this alone should be enough to decide this application.

## Decision Of The Court

**[49]** After hearing submissions from the plaintiffs' solicitor and the defendants' solicitor and after perusal of the affidavits filed herein and after reading solicitors' written submissions, my considered opinion is as follows.

*Was The Solicitor Client Privileged Waived?*

**[50]** In law the solicitor client privilege is absolute and permits of only one exception which is waiver:

(a) Upon the express consent of the client given and directed to the advocate; and

(b) such consent must be intentional and deliberate.

**[51]** Further, the common law rule of waiver by implication or imputation is not recognised. In order to establish that this privilege has been waived, the defendants have to prove both these elements.

**[52]** Federal Court in the case of *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ on 22 November 2006 had granted leave to the appellant to appeal against the decision of the Court of Appeal on the following questions:

(1) Whether the principle at common law relating to legal professional privilege, namely, 'once privileged, always privileged' is recognized under the Act, and if so, to what extent.

(2) Whether the principle of confidentiality is co-extensive with that of legal professional privilege under s. 126 of the Act so that the privilege continues until there is a waiver.

(3) Whether the circumstances enumerated in ss. 126 to 129 of when legal professional privilege can be lost are exhaustive.

(4) Whether the term 'express consent' in s. 126 imports the requirement that there must be an intentional and deliberate act to waive legal privilege by the privilege holder.

(5) Whether the Act recognizes the common law rule of loss of legal professional privilege by implied waiver or that waiver could be imputed by the conduct of the holder.

(6) Where a corporation is the privilege holder, whether its directors and principal officials are classifiable as third parties or outsiders for purposes of legal professional privilege.

(7) Where the privilege holder is a corporation, whether its professional advisers like accountants or auditors, in particular its external auditors would be considered as third parties or outsiders for the purposes of legal professional privilege.

(8) Whether the principle of a limited waiver by disclosure of a privileged document to specified persons which at common law could not cause loss of legal privilege applies in Malaysia.

(9) Whether legal professional privilege over a document could be lost by disclosure in the List of Documents under O. 24 r. 5(1) in Part 1 of the Schedule when privilege is expressly claimed in respect of the document in Part 2.

**[53]** With regard to the questions, Federal Court would answer them in order of questions (1) and (2) under privilege and confidentiality; questions (3), (4) and (5) under waiver and express consent; question (6), (7) and (8) under disclosure and third parties, and question (9) under discovery under O. 24 of the Rules of the High Court 1980 ('the RHC').

**[54]** The Federal Court held that:

[1] The Court of Appeal in taking the 'loss of confidentiality' approach to determine loss of privilege had failed to recognise the common law maxim 'once privileged, always privileged' as embodied in ss. 126 to 129 of the Act. This common law maxim has been endorsed and followed in the Malaysian cases (see paras. 18, 20 & 22); *Dato' Au Ba Chi v. Koh Keng Kheng* [1989] 3 MLJ 445 followed; *Emperor v. Mariane G Rodrigues* [1903] 5 Bombay LR 122 distinguished.

> [2] The finding of the Court of Appeal that 'confidentiality is a characteristic that can be lost' with a corresponding loss of privilege did not accord with the clear imperative terms of s. 126 which make no such reference, either expressly or by implication. The exception under s. 126 had nothing to do with loss of confidentiality. It is the privilege that has to be waived and not the confidentiality. Thus the legal professional privilege under s. 126 of the Act is absolute and remains so until waived by the privilege holder i.e. the client (see para. 23).
>
> [3] In the instant case, s. 126 of the Act permits only one exception when privilege no longer applies ie, upon the express consent of the client to the advocate. Thus the term 'express consent' in s. 126 imports the requirement that there must be an intentional and deliberate act to waive the legal privilege by the privilege holder ie, the client ...

**[55]** In view of the Federal Court decision, the requirement that there must be an intentional and deliberate act to waive the legal privilege by the privilege holder must be held as the applicable law.

*No Express Consent Was Given To Disclose To Defendants*

**[56]** From the facts I would agree with the plaintiffs' solicitor that the evidence shows that the managing director of the plaintiff had in its letter to the plaintiff's solicitors had stated "[d]o not hesitate to dialogue with myself or any of the people copied with this letter on any aspect of this issue" and Mark Helwig was one of these people. This to my mind cannot amount to the plaintiff giving its express consent to the solicitor to disclose the solicitor-client communications:

(a) Firstly, consent was given to the plaintiff's solicitors to have a dialogue with Mark Helwig on the issue. The applicable dictionary meaning of the word dialogue is "discussion directed towards exploration of a subject or resolution of a problem".

(b) This cannot amount to an express consent from the plaintiff to disclose the finished product of such dialogue namely the opinion of the solicitor concerned to Mark Helwig;

(c) Secondly, Mark Helwig was seconded to act as the plaintiff's project controls manager who was to act under the supervision of the plaintiff. In that capacity, any discussions and communications with Mark Helwig, at best, formed part of the privileged and internal discussions of the plaintiff.

(d) Thirdly, Mark Helwig was seconded by BMI and not the defendants. Even if this amounted to consent (which is not the case), at the most consent was given to disclose to BMI. No consent was given to either Mark Helwig or BMI to disclose to the defendants. This is especially so since the opinion dealt with the plaintiff's case against the defendants.

**[57]** In *Dato' Anthony See Teow Guan v. See Teow Chuan & Anor* [2009] 3 CLJ 405; [2009] 3 MLJ 14, FC at para. 35, it was said that:

> Since the trial judge found that no such consent was given, the notation of the words 'Alice' 'Tunku' dated 14 November and the initialling on the legal opinion by the appellant and his subsequently publishing it to other persons hardly constitute express consent on the part of KJCF to its advocate, PW1. At most, the notation was an internal communication within KJCF.

**[58]** Furthermore, the fact that solicitor-client communications came into the hands of the defendants through Mark Helwig does not mean that the privilege is lost or that the defendants are entitled to use it against the plaintiff. In this connection, the defendants used three of these opinions against the plaintiff during the stay proceedings filed earlier in this action. The plaintiff filed an affidavit in reply to oppose the stay application and had said that these opinions were illegally obtained, the solicitor-client privilege attached to these letters remained intact and these opinions are inadmissible and had asked the court to ignore them. Obviously, there was no express consent given for the use of the solicitor-client communications. See: Plaintiff's second affidavit/page 37 paras. 15-17.

**[59]** The Federal Court in *Dato' Anthony See Teow Guan*'s case ruled that privilege had not been waived or lost even when:

> The legal opinion was exhibited under "STC-2" of the respondent's affidavit in reply to the appellant's application for striking out and was read out by the respondents' counsel in the striking out proceedings before the registrar and on appeal before the same judge, who thereafter also heard the case.

The Federal Court added that:

> A document cannot be admitted as evidence if it is privileged even if it is in the hands of the opposite party. For example, if it is privileged, a document in the hands of an opposite party may be recovered back (see *B v. Auckland District Law Society*). If it has

wrongly been released to the opposite side in discovery proceedings or otherwise, it may be injuncted from use (see *International Business Machines Corp*).

**[60]** Interestingly, the defendants' solicitor had argued that *Dato' Anthony See Teow Guan*'s case cannot apply because the case dealt with s. 126 of the Evidence Act 1950 and the opening words in s. 126 used the words "[n]o advocate ..." So it was argued that the communication must have been disclosed by the advocate without the client's express consent. In this case he argued that the communication is passed by Mark Helwig who is not an advocate.

**[61]** The plaintiffs solicitor replied that the argument is without basis because in *Dato' Anthony See Teow Guan*'s case the appellant and the financial director of KJCF who met an advocate and solicitor in the firm of Shearn and Delamore ('the advocate') and gave her instructions about the respondents operating a company known as KL Metal Printing (M) Sdn Bhd ('KLMP'). Based on the information provided to her, the advocate rendered a legal opinion ('the legal opinion') addressed to KJCF for the attention of the appellant. The appellant subsequently published the legal opinion to various persons and in due course the respondents obtained a copy of the same. Therefore, it is not the lawyer who had disclosed the information to third party.

**[62]** I agree with the plaintiffs' solicitor reading of the facts in *Dato' Anthony See Teow Guan*'s case. I rejected the defendants' solicitor argument. The term 'express consent' in s. 126 imports the requirement that there must be an intentional and deliberate act to waive the legal privilege by the privilege holder ie, the client. In that case the client was the company KJCF and not the directors of KJCF and therefore it was for KJCF whether to waive the privilege and convey the consent to the advocate when she was called to give evidence.

**[63]** The common law maxim 'once privileged, always privileged' as embodied in ss. 126 to 129 of the Act must be recognised.

*Even If Consent Was Given Whether It Must Be Intentional And Deliberate*

**[64]** The defendant's affidavit at p. 36 contended that MNI and its legal team were aware Mark Helwig was a Bechtel employee at all times. Plaintiff's second affidavit/p. 16/para. 7.5 denied this

contention and contended that their legal counsel were not aware that Mark Helwig was associated with the first defendant; and at p. 35/para. 10-12 further contended that the disclosure of the solicitor-client communications to Mark Helwig was not intended and was clearly done by mistake or oversight in that the plaintiff solicitors were asked to explore and advise on the liabilities of the parties involved in the project including its numerous consultants and it had slipped the plaintiff's managing director's mind that Mark Helwig was employed by BMI who was related to the first defendant.

**[65]** On the defendants contention that there was knowledge by the MNI and its legal team that Mark Helwig was a Bechtel employee at all times, my opinion is that knowledge alone if any would not constitute as giving consent. There must be some evidence that MNI had directly or expressly allow Mark Helwig to disclose the documents copied to him to Bechtel. I tend to agree with the plaintiffs' solicitor that common sense dictates that such disclosure was made by way of an honest mistake without being intentional and deliberate which according to the Federal Court are necessary ingredients before solicitor client privilege can be waived. In this connection:

(a) It is ludicrous to suggest that the plaintiff would intentionally and deliberately give copies of its solicitor's opinion in respect of its case against the defendants to Mark Helwig to pass onto the defendants;

(b) It is even more ridiculous to suggest that the plaintiff's solicitors would intentionally and deliberately disclose solicitor-client privileged information to Mark Helwig knowing that he was employed by BMI or related to the defendants.

**[66]** Given that the common law rule of waiver by implication or imputation is not recognised, the defendants have to prove that the plaintiff had intentionally and deliberately consented to waive their solicitor-client privilege and this they have failed to do.

**[67]** In the circumstances of the case, it is my finding that the solicitor-client privilege attached to the solicitor-client communications remained intact:

(a) The defendants had obtained them wrongfully through Mark Helwig who had no right to pass them on to the defendants;

(b) The law is very clear that this privilege is absolute and permits of only one exception which is upon the express consent of the client given and directed to the advocate and which consent must be intentional and deliberate; and

(c) The common law rule of waiver by implication or imputation is not recognised and clearly, the defendants have failed to prove these elements as no express consent was given and in any event the disclosure to Mark Helwig cannot be said to be intentional or deliberate.

**"Without Prejudice" Document**

**[68]** One of the letters sought to be expunged are between solicitors and is marked without prejudice. It is settled law that these letters are inadmissible in evidence of the negotiations attempted. See: Section 23 of the Evidence Act 1950 at PBA Tab 2.

**[69]** In *Malayan Banking Bhd v. Foo See Moi* [1981] 1 LNS 95; [1981] 2 ML J 17 at PBA Tab 7, the Federal Court held that:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

**[70]** The privilege continues even after a compromise has been reached unless it has been waived (*Boss Ramasamy v. Penang Port Sdn Bhd & Anor* [1996] 1 LNS 26; [1996] 5 MLJ 511, 516-517).

**[71]** In fact in my own judgment which can be found in *Azhar Ab Wahab v. Acv-Icm Quarry Sdn Bhd* [2013] 1 LNS 37, I have ruled that the status of a letter written "without prejudice" offering the plaintiff a sum of RM20,000 for settlement is a privileged document.

**[72]** Therefore this letter dated 7 September 1998 which was issued in relation to the plaintiff's suit against its insurers on the defective design of the Newsprint Mill and the fact that it was filed in that suit between different parties cannot amount to a waiver of that privilege.

**[73]** I have also considered the defendants' allegation that para. 7 of the plaintiff's second affidavit is not to be relied on since Mr Graham Ogilvie has not filed any affidavit in this application. I agree with the plaintiffs and the allegation to my mind cannot be sustained.

**[74]** Order 41 r. 5(2) of the Rules of Court 2012 specifically states that affidavits used in interlocutory proceedings may contain statements of information and belief with the sources and grounds thereof (O. 41 r. 5(2) of the Rules of Court).

**[75]** In *Amakannu Veerapan & Ors v. Mayland Development Sdn Bhd* [2011] 5 CLJ 171 at PBA Tab 9, Zabariah J held that:

(1) The plaintiff objected to the admissibility of the defendant's affidavit. They contended that the affidavit was sworn by a person not related to the proceeding. Since this was not a final hearing but an interlocutory one, it would be highly misconceived at this stage to disallow the admissibility of the affidavit, as it can be affirmed based on one's personal knowledge of the matter therein. (para. 19)

(2) The plaintiffs' reliance on O. 41 r. 5(1) Rules of the High Court 1980 ('RHC') was of no assistance. The affidavit was sworn for the purpose of being used in interlocutory proceedings and contained statements of information or belief with the sources and grounds thereof. This was provided for in O. 41 r. 5(2) RHC and hence it could not be struck out. (paras. 20 & 26)

**[76]** I further agree with the plaintiffs' solicitor assertions that the deponent of this affidavit has stated the sources and grounds of his statements in that he has stated that he had checked with Graham Ogilvie who had confirmed the statements made in para. 7 of the plaintiff's second affidavit. Mr Ogilvie, a New Zealander, was the former managing director of the plaintiff who had left the plaintiff's employ before 2002. See: Paragraph 6.3 of the plaintiff's affidavit in reply affirmed by Nathan Kandapper in support of the plaintiff's application to Amend Pleadings (court encl. 63).

**[77]** In fact the same objection can be made in respect of all statements made by Mark Helwig in that no admissible affidavit has been filed by him as well. In this connection, none of the purported affidavits of Mark Helwig were affirmed before a Malaysian consular officer as required by law. If all averments made by Mark Helwig are inadmissible, there will in fact be no need to respond to them. See: Order 41 r. 12 Rules of Court 2012 which is *in pari materia* with the Rules of the High Court 1980.

**Public Document**

**[78]** The documents in question, in my opinion do not qualify as public documents pursuant to s. 74 of the Evidence Act 1950. The section defines public document. It provides for two classes of public documents. The first class includes the acts or records of the acts of certain authorities and officers. The second class relates to public records of private documents. It is clear from s. 74 that the documents must itself form the act or record of the acts of public officer (*Dr Munawar Ahmad Aness v. Ketua Pengarah Penjara Malaysia & Ors* [1999] 6 CLJ 332; [1999] 2 MLJ 289, 302-303 HC). See *Sarkar on Evidence* (14th edn.) p. 1078.

**[79]** In *Heyne v. Fischel & Co* (1913) 30 TR 190, it was held that documents kept in the post office showing the times telegrams were received and sent were held not to be a public record. Augustine Paul in *Gopinathan Subramaniam v. Timbalan Menteri Dalam Negeri & Ors* [1999] 7 CLJ 558; [2000] 1 MLJ 65, 73-74 quoting *Sturla v. Freccia* (1880) 5 AC 623, Lord Blackburn, in defining a 'public document' under English law, said at p. 643:

> But it be public document, and it must be made by public officer, I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial duty to inquire ... I think the very object of it must be that it should be made for the purpose of being kept public, so that the persons concerned in it may have access to it afterward.

**[80]** Even if those documents are public documents, the fact that a document is a public document does not necessarily mean that it is either relevant or admissible. That question has to be decided with reference to the other provisions of the Act. (per Mokhtar Sidin J (as he then was) in *Dato' Yap Peng v. Public Prosecutor* [1993] 2 CLJ 181; [1993] 1 MLJ 337, 349 HC.

**[81]** Finally it was submitted that there will be a serious miscarriage of justice to the defendants and the defendants will be severally prejudiced in the event the defendants are not allowed to refer to the nine said letters at the trial of this action. I have considered this submission and in my considered opinion, a document cannot be referred and admitted as evidence if it is privileged even if it is in the hands of the opposite party. For example, if it is privileged, a document in the hands of an opposite party may be recovered back.

**[82]** Based on the foregoing, all documents marked or made without prejudice as well as documents covered by professional solicitor-client privilege, including to those listed in appendix A of the plaintiff's first affidavit, should be expunged and excluded from being admitted at trial or in court in the present action.

**[83]** In conclusion I found favour for the plaintiffs application and give order in terms for encl. 64. The "attached documents" as appearing at prayer 1 of plaintiffs' application is excluded since these types of documents have been deemed unnecessary.

**[84]** Costs of RM1,500.